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IN THE

Supreme Court of the United States

October Term, 1956.

No. 886

LUCILLE H. BURCH,
Petitioner,

v.

READING COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

B. NATHANIEL RICHTER,
SEYMOUR I. TOLL,
BARBARA ANN DUFFY,
RICHTER, LORD & LEVY,
Counsel for Petitioner.

121 South Broad Street,
Philadelphia 7, Pa.

International, 236 Chestnut St., Phila. 6, Pa.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Chief Justice, and the Associate Justices, of the Supreme Court of the United States:

Lucille H. Burch, by her attorneys, respectfully petitions that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on January 8, 1957.

OPINIONS BELOW.

The opinion of the Court of Appeals is to be found at 240 F. 2d 574 (C. A. 3, 1956). The opinion of the District Court, with which the majority of the Court of Appeals was "in full accord" is to be found at 140 F. Supp. 136 (D. C. E. D. Pa., 1956). This is the final judgment of the United States Court of Appeals for the Third Circuit, where judgment was entered for the respondent-defendant affirming the judgment of the United States District Court for the Eastern District of Pennsylvania, where judgment was entered for respondent-defendant on the verdict. Judge Kalodner dissented in the Court of Appeals.

JURISDICTION.

The judgment of the United States Court of Appeals for the Third Circuit was entered on January 8, 1957. The jurisdiction of this Court is invoked under c. 646, Act of June 25, 1948, 62 Stat. 928, 28 U. S. C. Sec. 1254 (1).

QUESTIONS PRESENTED.

I. In an action under the Federal Employers' Liability Act [1] is it not error for the Court of Appeals to affirm the action of a trial judge in taking from the jury's consideration competent evidence from which the jury could find respondent negligent in directing that petitioner do work beyond her capacity solely on the ground that such evidence presented conflicting inferences?

II. Is not the Court of Appeals in error in affirming the trial judge's charge, the substance of which was that an employer under the F. E. L. A. has no antecedent duty of inspecting premises where it knows or should know that one of its employees is required to perform her duties?

III. Is it not error for the Court of Appeals to affirm a jury instruction that as a matter of law if the petitioner's injury resulted from an accidental slip on a few pebbles, there would be no liability when those very pebbles presented evidence from which a jury could have found an unsafe place to work?

IV. Is it not error for the Court of Appeals to affirm the trial judge's submission to the jury of the question of whether the accident in suit occurred by reason of "sheer and unavoidable accident" where the submission of that issue was unrelated to a record containing admitted facts

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1. 35 Stat. 65, as amended, 36 Stat. 291, 53 Stat. 1404, 45 U. S. C. § 51 *et. seq.*

that indicated negligence and nothing to suggest an act of God?

V. Is not the Court of Appeals in error in affirming a jury charge regarding plaintiff's burden of proof as to negligence in an F. E. L. A. action which variously instructed the jury that the plaintiff's burden of proof was one of the "big points" in the case; that a verdict for defendant must be returned unless the jury had a "conviction" as to negligence; that it is plaintiff's burden "to convince [the jury] that there was . . . negligence" and that "If there is just a doubt in your mind, you must bring in a verdict for the defendant . . ."?

VI. Is not the Court of Appeals in error in affirming a jury instruction that the jury " . . . should no more be swayed by sympathy for the plaintiff than for the widows and orphans who may be receiving dividends or interest from [respondent railroad] and who may need that income for themselves and for their families"?

THE STATUTE INVOLVED.

The Federal Employers' Liability Act, 45 U. S. C. A., 35 Stat. 65, as amended, 36 Stat. 291, 53 Stat. 1404, § 51 *et seq.* the pertinent portion of which reads as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States . . . , shall be liable in damages to any person suffering injuries while he is employed by such carrier in such commerce, . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

STATEMENT OF THE CASE.

This is a suit brought under the above statute for injuries sustained by petitioner on November 27, 1950, while in the employ of respondent.

Petitioner had been employed by respondent in a track gang for six years prior to the date of the accident (44a, 46a). On the day in question, her foreman, Mr. DiLuzio, had sent her gang to repair Scott's Lane grade crossing in Philadephia (15a, 219a). Respondent's track bisects Scott's Lane. The road came up a hill with a fifteen degree grade immediately beyond the crossing to the south. This is a very steep grade (128a). The surface of Scott's Lane was badly worn and full of pebbles all the way from the crossing down to the bottom of the hill (25a, 136a, 137a). It was pitted with holes and many pebbles which had pulled loose because the asphalt surface or binding material which was supposed to hold the pebbles in place had worn away (25a, 78a, 124a, 127a, 136a, 137a). It was difficult to get a decent footing when walking on this hill and it was very slippery due to the loose pebbles (127a, 128a). This whole section of the road, including the point at which petitioner was injured, was to be completely repaved by the City of Philadelphia (133a, 134a).

On the day in question, petitioner had been directed by her foreman to carry dirt in a three-foot shovel from a pile lying east of the roadway and south of the crossing and she was to dump it into a hole in the crossing (15a, 16a, 27a). While walking diagonally down across Scott's Lane to the dirt pile to get another shovelful, she fell and suffered the injuries complained of. As she fell her feet rolled under her. She felt pebbles under her shoes (55a). The place in question was surrounded with pebbles and those pebbles caused her to fall (63a-67a). Her foreman admitted that he found the skid mark of her shoe right after the accident had happened and saw twenty or thirty pebbles around the immediate area (221a, 222a). The

day was cold and the streets were dry and free of ice and snow (15a, 226a). There was thus no condition other than the loose pebbles which could have contributed to the accident in suit.

R. W. Morrison, respondent's track supervisor, admitted that he had issued an order to the track foreman to keep female employees out of sight so that they would not be visible to respondent's Board of Directors who would be going past on trains (146a, 148a). Morrison admitted that he had directed that they keep the track cleaned up, in good shape and free of debris. Another of Morrison's orders was to the effect that women were to be made to work as hard as men and render the same services as men (161a-162a). This was respondent's policy. Other evidence established that any women who complained that the work was too hard were to be laid off (157a, 158a, 162a). All of Morrison's testimony and underlying exhibits were stricken by the trial court and the jury was instructed to disregard it (291a, 321a, 324a).

The aforementioned DiLuzio admitted that he had an order to make the women work as hard as the men but that he tried to circumvent the order because he knew that women were not able to do this kind of work, and that he tried to act "human" and gave them lighter jobs when he could (224a, 227a-228a). Notwithstanding this, on the day in question DiLuzio assigned petitioner the job of carrying soil in a shovel up and down the hill in question (228a, 229a).

As a result of the accident in suit, the petitioner suffered a severely fractured ankle, atrophy of the bone, arthritis of the joint with narrowing of the articular spaces where the various bones of the ankle are made up and a thickening of the outer surface. The site itself represents in its entirety a completely abnormal joint. The condition is permanent (86a, 87a). There was also considerable soft tissue damage, traumatic arthritis of the left ankle and a foot drop as a result of nerve damage (95a).

The case was submitted to the jury after a charge by the trial judge which was fraught with error as indicated in the "Argument" *infra*. Appropriate exceptions were taken by the petitioner to various portions of the charge and petitioner in addition moved for the withdrawal of a juror because of the error and unfairness of it (346a-353a, 356a-357a). The jury returned a verdict for the defendant.

Petitioner thereafter filed a motion for a new trial (371a-375a) which was subsequently denied by the trial court in an opinion reported at 140 F. Supp. 136 (376a-412a). Petitioner appealed from the judgment of the District Court and the judgment was affirmed by the United States Court of Appeals for the Third Circuit on January 8, 1957, by a divided court. Circuit Judge Maris was joined in the affirmance by District Judge Wortendyke. Circuit Judge Kalodner dissented. This petition for certiorari follows.

REASONS FOR GRANTING THE WRIT.

For the purpose of clarity, a statement of reasons for granting the writ is here set forth. These are expanded in the argument following this resumé.

1. This decision is in conflict with the decisions of this Court in *Quercia v. United States*, 289 U. S. 466, 53 S. Ct. 698 (1933); *Blair v. B. & O. R. R. Co.*, 323 U. S. 600, 65 S. Ct. 545 (1945); *Lavender v. Kurn*, 327 U. S. 645, 66 S. Ct. 740 (1946); *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409 (1944); *Myers v. Reading Company*, 331 U. S. 477, 67 S. Ct. 1334 (1947); *Lillie v. Thompson*, 332 U. S. 459, 68 S. Ct. 140 (1947); *Wilkerson v. McCarthy et al.*, 336 U. S. 53, 69 S. Ct. 413 (1949); *Stone v. N. Y. C. & St. L. RR.* 344 U. S. 407, 73 St. Ct. 358 (1953); *Rogers v. Missouri Pacific Railroad Co.*, 352 U. S. 500, 77 S. Ct. 443 (1957); *Webb v. Illinois Central Railroad Co.*, 352 U. S. —, 77 S. Ct. 451 (1957); *Shaw v. Atlantic Coast Line R. R. Co.*, No. 743 and *Futrelle v. Atlantic Coast Line R. R. Co.*, No. 782, both decided April 1, 1957.

2. One of the questions presented by this case is now before this Court in *Texas & Pacific Railway Company v. Thompson,* 232 F. 2d 313 (C. A. 5, 1956), cert. granted on October 22, 1956, No. 321, and *Deen v. Gulf, Colorado and Santa Fe Railway Company,* 275 S. W. 2d 529, cert. granted October 8, 1956, No. 199 both set for argument the week of April 1, 1957.

3. This decision is in conflict with the decisions of the United States Court of Appeals for the Second Circuit in *Stewart v. B. & O. R. R. Company,* 137 F. 2d 527 (C. A. 2, 1943); *Comiskey v. P. R. R.,* 228 F. 2d 687 (C. A. 2, 1956); *Cereste v. New York, New Haven & Hartford R., Co.,* 231 F. 2d 50 (C. A. 2, 1956), cert. denied 351 U. S. 95, 76 S. Ct. 848 (1956); *Larson v. Jo Ann Cab Corp.,* 209 F. 2d 929 (C. A. 2, 1954); *Johnson v. Erie Railroad Co.,* 236 F. 2d 352 (C. A. 2, 1956).

4. This decision is in conflict with the decisions of the same Court of Appeals in *Nuttall v. Reading Company,* 235 F. 2d 546 (C. A. 3, 1956); *Robak v. P. R. R.,* 178 F. 2d 485 (C. A. 3, 1949); *Robinson v. Pennsylvania R. Co.,* 214 F. 2d 798 (C. A. 3, 1954).

5. This decision is in conflict with the decisions of the United States Court of Appeals for the Fourth Circuit in *Chesapeake & Ohio Ry. Company v. Thomas,* 198 F. 2d 783 (C. A. 4, 1952) cert. denied 344 U. S. 921, 73 S. Ct. 387 (1953); *Virginian Rwy. Co. v. Armentrout,* 166 F. 2d 400 (C. A. 4, 1948).

6. This decision is in conflict with the decisions of the United States Court of Appeals for the Fifth Circuit in *Williams v. Atlantic Coast Line R. Co.,* 190 F. 2d 744 (C. A. 5, 1951); *Johnson et al. v. Macias,* 193 F. 2d 475 (C. A. 5, 1952).

7. This decision is in conflict with the decisions of the United States Court of Appeals for the Sixth Circuit in *Carpenter v. B. & O. R. Co.,* 109 F. 2d 375 (C. A. 6, 1940);

Knapp v. Kinsey, 232 F. 2d 458 (C. A. 6, 1956), cert. denied 352 U. S. 892, 77 S. Ct. 131 (1956).

8. This decision is in conflict with the decisions of the United States Court of Appeals for the Seventh Circuit in *Waddell v. Chicago & E. I. R. Co.*, 142 F. 2d 309 (C. A. 7, 1944) cert. denied 323 U. S. 732, 65 S. Ct. 69 (1944); *Beattie v. Elgin, Joliet & Eastern Railway Co.*, 217 F. 2d 863 (C. A. 7, 1954).

9. This decision is in conflict with the decisions of the United States Court of Appeals for the Eighth Circuit in *Terminal R. Ass'n. of St. Louis v. Fitzjohn*, 165 F. 2d 473 (C. A. 8, 1948); *Chicago G. W. R. Co. v. Smith*, 228 F. 2d 180 (C. A. 8, 1955); *Chicago G. W. R. Co. v. Casura*, 234 F. 2d 441 (C. A. 8, 1956); *Sperber v. Connecticut Mut. Life Ins. Co.*, 140 F. 2d 2 (C. A. 8, 1944), cert. denied 321 U. S. 798, 64 S. Ct. 939 (1944); *Cook v. United States*, 18 F. 2d 50 (C. A. 8, 1927); *Boatright v. United States*, 105 F. 2d 737 (C. A. 8, 1939); *Stoneking v. United States*, 232 F. 2d 385 (C. A. 8, 1956), cert. denied 352 U. S. 835, 77 S. Ct. 54 (1956).

10. This decision is in conflict with the decisions of the State Courts of last resort in *Brock v. Gulf Mobile & Ohio Railroad Company*, 270 S. W. 2d 827 (Mo., 1954); *Nelson v. Lee*, 32 So. 2d 22 (Ala., 1947); *Hill Grocery Co. v. Wilson*, 89 So. 2d 687 (Ala., 1956); *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 73 A. 2d 387 (1950); *Narcisco v. Mauch Chunk Township*, 369 Pa. 549, 87 A. 2d 233 (1952); *Knight v. Allegheny County*, 377 Pa. 502, 105 A. 2d, 141 (1954).

11. This decision, unless corrected, will inevitably and rapidly generate a flood of additional litigation and appeals on aspects of the Federal Employers' Liability Act which are common to most such cases and equally common to a vast number of cases in general civil litigation.

Point I.

In an F. E. L. A. Action Evidence Susceptible of the Inference That an Employee Had Negligently Been Directed or Permitted to Do Work Beyond Her Capacity Must Be Submitted to the Jury as Well as the Theory Underlying It, and the Fact That Such Testimony May Present Conflicting Inferences Also Commands Submission to the Jury.

This Petition unavoidably raises a number of critical issues of law, the resolution of which will have extremely widespread ramifications into the administration of the Federal Employers' Liability Act, 35 Stat. 65, as amended, 36 Stat. 291, 53 Stat. 1404, 45 U. S. C. § 51 *et seq.* and vital areas of general civil litigation.

In the case at bar, the majority of the Court of Appeals below did not deal with all of them in its opinion but that Court did however find itself "in full accord"[2] with the holding of the trial judge (at page 2a). It is therefore clear that the source of the errors which must be corrected by a grant of this Petition and a reversal of the judgment below can fairly be said to be in the Court of Appeals for the Third Circuit.

This was a simple F. E. L. A. case. As a result of the errors below which are the product of extraordinary indifference to the integrity and force of prevailing rules of law, it has become a grotesque cause.

Petitioner's case was tried on the double theory that: (1) respondent had negligently failed to furnish her with a safe place to work and/or (2) had negligently directed or permitted her to do work beyond her capacity. Nothing more than that was involved. We shall shortly discuss the manner in which the trial court erroneously emasculated the "safe place to work" issue. As to the other issue, that

2. All subsequent references to the opinion of the Court of Appeals are to the opinion as paginated in the "Appendix", *infra*.

court simply tore it bodily out of the case. The rationale on which it did so finds no justification in the record and, most remarkably, the very language with which it seeks to justify that excision propounds a rule of law which is in absolute conflict with a large and until now uniform body of rulings on the point. In holding itself in "full accord" with the trial judge the Third Circuit has isolated and set itself at war with this Court, and other Courts of Appeals. The courts below stand alone in the views they have taken of the issues here.

At the trial petitioner proved in support of this second theory of liability that each woman was instructed that she must do the same hard work as men; that complaints had been made by female employees that the work was too hard; that respondent was on notice that this work was too hard for women and had taken the position that since there were such complaints, the female employees would be held responsible (155a, 156a, 157a, 158a, 161a, 162a, 417a-419a). In Exhibit 10 (419a), specifically addressed to petitioner, respondent stated that another female laborer had made a complaint about the work being too arduous and that since petitioner had not taken exception thereto, she was considered by the respondent as likewise making the same complaint.

There was thus before the jury evidence in the nature of an admission by respondent that this work was beyond petitioner's capacity. The author of the exhibit, Morrison, was respondent's track supervisor under whom petitioner worked. On his direct examination he testified (158a):

> "Q. Now, having had these notices brought to your attention, was there or was there not and had there or had there not been substantial discussion between the railroad company, through you, and these women laborers in regard to the duties that were being imposed upon them as laborers?
>
> A. Not upon the duties being imposed upon them. Upon the amount of work they were turning out.

Q. And whether they could do that kind of work?

A. There was a discussion about that.

Q. Whether they could do that kind of work; is that right?

A. Yes, sir."

On cross-examination he testified (161a):

" 'Q. Were they expected to do the same kind of work when they were hired that men laborers were expected to do?'

A. That is my understanding, that they were.

By Mr. Brown:

Q. During the years from 1944 to 1950 was there ever any instruction given by the management of the company that women track laborers were not to do the same kind of work as male track laborers?

A. No, sir.

Q. Did they continue during that time from 1944 to 1950 to do the same work as male laborers, with the approval of the management?

A. Yes, sir, the management approved the arrangement."

* * *

"Q. What, if you know, was the policy of the management as it came down to you with respect to whether track laborers should be doing heavy work as opposed to picking up papers?

"A. It is the policy of the management to get as much heavy work done as we can, but they recognize, in fact, that there is a certain amount of light duties that must be taken care of also, but primarily it is to do the heavy work."

The court struck out all of Morrison's testimony and underlying exhibits and so charged the jury (321a, 324a).

In its opinion the trial court denied that it ruled as a matter of law that petitioner could not recover on this

theory, and rested its denial on the assertion that "The court did not use any such language in the charge . . ." (383a). The court also claimed that we had neither requested to charge on the theory nor specifically pointed out to the court its failure so to charge (383a-384a).

This was not so. We raised it as early as the pretrial conference (7a). It was suggested to the court during trial (242a) and the court recognized our position (243a). After striking it from the case, the court granted us an exception (291a). The record is therefore protected.

This is the heart of the trial court's rationalization of its ruling (386a-387a):

> "Since plaintiff was unsuccessful in showing any admission by the company, or by Mr. Morrison personally, or any other evidence that plaintiff was doing any work in excess of her physical ability or that plaintiff had ever made a claim that she had been asked to do work which was too difficult for her, and *since consideration of this testimony and these memoranda had emphasized conflicting inferences that might be drawn from the language of four exhibits* (*P-9, P-10, P-12 and P-13*), [footnote] *offered by plaintiff*, the court granted defendant's motion to strike the testimony of Mr. Morrison just before the closing speeches [footnote] and advised the jury to disregard the testimony of Mr. Morrison at the beginning of the charge [footnote]. . . ." (Emphasis supplied.)

On this unambiguous statement the court took from petitioner her right to trial by jury on the issue and in doing so flatly refused to adhere to clear law on the subject. That is error enough. Even more remarkable is that the Court of Appeals, having such error brought directly to its attention, refused to treat it at all in its opinion except to find itself "in full accord" with the trial judge.

The effect of the decisions below is to withhold from the jury's consideration a theory of liability under the

F. E. L. A. well bottomed in evidence and authenticated by clear, authoritative decisional law.

This Court directly acknowledged the validity of the theory in *Stone v. N. Y. C. and St. L. R. R.*, 344 U. S. 407, 73 S. Ct. 358 (1953); *Blair v. B. & O. R. R. Co.*, 323 U. S. 600, 65 S. Ct. 545 (1945), and can fairly be said to have done so in *Lillie v. Thompson*, 332 U. S. 459, 68 S. Ct. 140 (1947). The question is squarely before this Court now in *Texas and Pacific Railway Company v. Thomson*, 232 F. 2d 313 (C. A. 5, 1956), cert. granted October 22, 1956, No. 321, and *Deen v. Gulf, Colorado and Santa Fe Railway Company*, 275 S. W. 2d 529, cert. granted October 8, 1956, No. 199, both set for argument in the week beginning April 1, 1957.

The decisions below are also in conflict with the law in the Second Circuit: *Stewart v. B. & O. R. R. Co.*, 137 F. 2d 527 (C. A. 2, 1943); *Comiskey v. P. R. R.*, 228 F. 2d 687 (C. A. 2, 1956); with the law previously announced by the Court of Appeals below: *Nuttall v. Reading Company*, 235 F. 2d 546 (C. A. 3, 1956); *Robak v. P. R. R.*, 178 F. 2d 485 (C. A. 3, 1949); and with the law in the Fifth Circuit: *Williams v. Atlantic Coast Line R. Co.*, 190 F. 2d 744 (C. A. 5, 1951).

See also *McGuigan v. Southern Pacific Company*, 247 P. 2d 415 (D. C. of App. 1st Dist., Cal., 1952).

The error of the courts below in refusing to acknowledge the operation of this theory of liability in the case was of a piece with their excision of the evidence in question. Under F. E. L. A. decisional law there was an evidentiary basis in this record for a jury's finding of negligence on the theory claimed. *Lavender v. Kurn*, 327 U. S. 645, 66 S. Ct. 740 (1946). The two theories of liability in question were closely interwoven, and it was clear that respondent's negligence could have been considered on one theory or the other, or both. In those circumstances the employer's negligence may be determined by viewing its conduct as a whole. *Blair v. B. & O. R. R. Co., supra.* These cases,

we respectfully submit, completely substantiate our view, but if there were any lingering doubts they have been dispelled by the recent holdings in this Court in *Rogers v. Missouri Pacific Railroad Co.*, 352 U. S. 500, 77 S. Ct. 443 (1957); *Webb v. Illinois Central Railroad Co.*, 352 U. S. —, 77 S. Ct. 451 (1957); *Shaw v. Atlantic Coast Line R. R. Co.*, No. 743 and *Futrelle v. Atlantic Coast Line R. R. Co.*, No. 782, both decided April 1, 1957.

As we had earlier indicated, the very language of the trial court used to justify the excision is in total conflict with the great body of law on the point. Whereas it found, and the Court of Appeals was in full accord with the finding, that "conflicting inferences" arose from the testimony and memoranda in question and therefore struck the testimony from the case, that is exactly what should not have been done. In this posture, the matter had to be for the jury. *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409 (1944); *Myers v. Reading Company*, 331 U. S. 477, 67 S. Ct. 1334 (1947).

Point II.

Under the F. E. L. A. the Employer's Absolute Duty to Use Reasonable Care to Furnish a Reasonably Safe Place to Work Includes the Duty of Antecedent Inspection of That Place.

The Trial Court charged (330a):

> "Even if you believe plaintiff's position that there were so many pebbles that an unsafe condition existed, you must consider, among other things, whether the defendant's foreman, Mr. DiLuzio, who was the defendant's chief representative on the scene, should have had notice of this condition, in view of the fact that only an hour, approximately, elapsed between the time work started at this location and the time of the accident and the fact that plaintiff herself admitted that

all the other workmen, except the man loosening the dirt in the pile of dirt for her, were on the other side of the railroad track.

"You must decide whether this condition existed long enough so that the defendant, under all the circumstances, could be said to have failed to have used reasonable care in not removing the pebbles by sweeping or otherwise."

The effect of this instruction was to leave the jury with the understanding that respondent could lawfully order or permit its crew to begin working immediately upon arrival at the place in question regardless of its condition, and that the employer would *thereafter* have a reasonable time to inspect it to determine whether it was reasonably safe. If this were the law, the doctrine of safe place to work would be words stripped of substance. It is not the law.

In *Webb v. Illinois Central R. Co.*, 352 U. S. —, 77 S. Ct. 451 (1957) decided in this Court on February 25, 1957, petitioner slipped and fell over a clinker which was imbedded in the roadbed of the railroad. The holding there necessarily assumes that liability flowed from respondent railroad's breach of its duty to make an antecedent inspection of the place where its employee was injured. The Court there said:

"As the jury might find that the clinker was in the ballast used in the repair work, so also the jury might find, from the fact that it was in the roadbed for three weeks, that inspection was not properly made. There was evidence from which it could have been found that the clinker was not discovered either by the foreman in semiweekly inspections of the location, made in part to discover and remove hazards to workmen, or by a track inspector and a track supervisor making less frequent inspections. It was for the jury to weigh

the evidence and to decide whether or not the inspections satisfied respondent's duty to provide the petitioner with a safe place to work."

The "inspection" referred to necessarily means an inspection antecedent to the employee's working in the place in question.

The charge on the point in question (330a), of course, means that railroads may furnish—that is provide at the outset—unsafe places to work to their employees, and they thereafter have some unspecified period of time within which they may make an inspection to determine and correct the unsafe condition. This would simply make a mockery of the safe place to work doctrine.

Since the employer's duty is to *furnish* a safe place to work, directing or permitting an employee to enter an unsafe place to work such as here is palpably the breach of that duty. It is negligence. What in effect has been done by the courts below is to destroy the absolute quality of the duty and instead make of it a spurious duty coming into play at some indefinite time after the employee has arrived at the scene. There is thus created a hiatus in which injury may result from the employer's negligence—failing to furnish a safe place to work—and yet the employer will be insulated from liability on the claim that it did not have a reasonable time after furnishing the unsafe place to discover its condition.

Not to correct the error below would generate a rash of additional litigation in all such cases, for defendants would always claim that even though admittedly they furnished an unsafe place to work, they did not have a reasonable time after the employee had been placed in those circumstances in which to discover the unsafe quality of the area. It is an impossible contention because it posits a breach of a duty which is by definition negligence and yet claims that breach is not necessarily negligence—a bold contradiction in terms. This is the embarrassing logic of the

error below. If the doctrine is to have any meaning at all, it must subsume the duty of the employer to make an antecedent inspection.

What is urgently needed now and what only this Court can give with the full force of its authority is a clear restatement laying down the duty of antecedent inspection. Only thus will such potential litigation be smothered.

Cases in other Courts of Appeals demonstrate the law to be other than that suggested by the erroneous rulings below. These erroneous decisions below are thus in conflict with the law in the Second Circuit: *Cereste v. New York, New Haven & Hartford R. Co.*, 231 F. 2d 50 (C. A. 2, 1956), cert. denied 351 U. S. 95, 76 S. Ct. 848 (1956); with the law in the Fourth Circuit: *Chesapeake & Ohio Ry. Co. v. Thomas*, 198 F. 2d 783 (C. A. 4, 1952), cert. denied 344 U. S. 921, 73 S. Ct. 387 (1953); *Williams v. Atlantic Coast Line R. Co.*, 190 F. 2d 744 (C. A. 5, 1951); with the law in the Seventh Circuit: *Waddell v. Chicago & E. I. R. Co.*, 142 F. 2d 309 (C. A. 7, 1944), cert. denied 323 U. S. 732, 65 S. Ct. 69 (1944); *Beattie v. Elgin, Joliet and Eastern Railway Co.*, 217 F. 2d 863 (C. A. 7, 1954); with the law in the Eighth Circuit: *Terminal R. Ass'n of St. Louis v. Fitzjohn*, 165 F. 2d 473 (C. A. 8, 1948); *Chicago G. W. R. Co. v. Smith*, 228 F. 2d 180 (C. A. 8, 1955); *Chicago G. W. R. Co. v. Casura*, 234 F. 2d 441 (C. A. 8, 1956).

See also: *Brock v. Gulf, Mobile & Ohio Railroad Company*, 270 S. W. 2d 827 (Mo., 1954).

Point III.

Where There Is Evidence From Which a Jury Can Infer the Cause of the Accident in Suit, Instructions Permitting a Finding That Injuries Resulted From a Mere Accident Are Erroneous.

The trial court charged:

". . . If you find that the injury resulted from an accidental slip on one of a few pebbles, neither the de-

fendant nor the plaintiff could be said to be negligent, and you must find a verdict for the defendant, of course. The railroad isn't responsible for accidents. They might happen anywhere." (330a)

To charge thus in the face of this record where the reasonable inference can be drawn that petitioner slipped as a result of the presence of pebbles on the road surface is sheer error. Such an instruction would permit the jury to make a finding that had no basis in law or in fact.

A large number of cases have laid down this general principle of law with which the decisions below are now in conflict.

In *Wetterer v. The Atchison, Topeka & Santa Fe Ry. Co.*, 277 Ill. App. 275 (1934), cert. den. 295 U. S. 754, 55 S. Ct. 835 (1935), the defendant asked the Court to charge as follows at 298:

> "The Court instructs you that the fact that if you believe from the evidence the injury complained of by the plaintiff was the result of a mere accident, you must find the defendant not guilty."

The court held that it would have been error so to charge. One may not charge in the abstract. The facts of a case must be tied in with the allegations and proof. The jury must give due consideration to the facts in the case and decide whether under all the evidence there was or was not negligence. As the *Wetterer* case points out, this instruction on mere accident is subject to the criticism that it omits the question of negligence which may have caused the accident. The question of negligence must be incorporated in the specific point. This the court below did not do in this case as it did not in *Wetterer*.

In *Johnson et al. v. Macias*, 193 F. 2d 475 (C. A. 5, 1952), the plaintiff while on defendant's premises was injured when struck by flying fragments of a metal pulley which disintegrated while revolving at a high speed. The

court affirmed a verdict for the plaintiff and held that the trial judge properly refused to charge on the subject of "unavoidable accident". Said the Court at 479:

> "The trial court did not err in refusing to give a charge on 'unavoidable accident'. An 'unavoidable' accident is one which is not occasioned in any degree, directly or remotely, by lack of due care. If the injury complained of could have been prevented by the exercise of reasonable prudence, it would not be the result of 'unavoidable' accident. *There is no evidence here tending to show that plaintiff's injuries resulted from any cause other than negligence on the part of some one.* The issue of unavoidable accident is therefore not presented. Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S. W. 2d 944, 97 A. L. R. 1513; Dallas Terminal Co. v. Darden, Tex. Com. App., 38 S. W. 2d 777. Finding no prejudicial error, the judgment is Affirmed." (Emphasis ours.)

In *Maher v. St. Louis & S. F. Ry Co.*, 234 S. W. 1034 (St. Louis Ct. of App., Mo., 1921), the court held that the trial judge properly refused to instruct the jury ". . . that if the injury received was caused by accident, mischance or misadventure, and without the negligence of either plaintiff or defendant, plaintiff was not entitled to recover" (at 1037). The point as submitted failed to tie into the factual issues in the case. See also *Kansas City, M. & O. Ry. Co. v. Estes*, 228 S. W. 1087 (Tex. 1921) and *Pennsylvania R. Co. v. Ribkee*, 174 N. E. 427 (Indiana, 1930).

Indeed, we might note that respondent had not pleaded in this case that this was a "mere accident" or an "unavoidable accident". Hence this was not an issue in this case. The court should not have charged upon subjects which were not properly made issues in the case.

In *Carpenter v. B. & O. R. Co.*, 109 F. 2d 375 (C. A. 6, 1940), the court so held. At page 379 said:

> "Applying the well-recognized rule that in determining the scope of instructions, the court must keep in mind the issues as made by the pleadings in the cause and that no instructions be given which tender an issue not supported by the pleadings, the court committed an error in submitting to the jury the issue of contributory negligence and assumed risk and in charging the jury that the fellow servant rule applied."

The other prejudicial effect which resulted from a charge such as this was accurately noted by Judge Kalodner in his dissent below. It is that such a charge is an inferential ruling that there was no absolute duty on the part of the defendant to provide the plaintiff with a reasonably safe place to work, thus operating in effect to take from the jury's consideration the entire "safe place to work" issue (at page 16a). Thus, not only was that issue emasculated by the court's failure to charge the duty of antecedent inspection, but what little life that might have been left in it was destroyed by this inferential ruling.

In so doing, the courts below give recrudescence to the rule of *Seaboard Air Line Ry. v. Horton*, 233 U. S. 492, 34 S. Ct. 635 (1914) declared no longer to be the law in *Wilkerson v. McCarthy*, 336 U. S. 53, 69 S. Ct. 413 (1949).

Point IV.

A Jury Charge in an F. E. L. A. Case Which Places Upon the Plaintiff the Burden of "Convincing" the Jury of Negligence and Exonerates Defendant of Liability in the Absence of That "Conviction" or "If There Is Just a Doubt" in the Jury's Mind Imposes Upon Plaintiff a Prejudicial and Patently Erroneous Burden of Proof.

The concept of different burdens of proof in civil and criminal cases is part of the bedrock of Anglo-Saxon law. The criminal accused is shielded by a number of fundamental safeguards one of which is that a finding of guilt can be made only after the prosecution has carried the

great burden of proving guilt "beyond a reasonable doubt." This is the heaviest burden of proof known to our law. With that onerous burden this petitioner was shackled in an F. E. L. A. action.

In most civil cases, and certainly in F. E. L. A. actions, the plaintiff bears no such burden. He need only prove his case by a mere preponderance of the evidence. It is primer law that there is a great difference between the burdens of "preponderance of the evidence" and "beyond a reasonable doubt." In order to meet the test of preponderance of the evidence all that is necessary is that the evidence in the plaintiff's case merely outweigh that in the defendant's case, so that it tips the scale in the plaintiff's favor or stated simply: the plaintiff need only show that he has a better case than defendant. To require in an F. E. L. A. case that the jury be "convinced" by argument to belief beyond doubt is to place upon a plaintiff at least as heavy a burden as that imposed on the prosecution in a criminal case, and, of course, it profoundly diminishes railroad defendants' exposure to verdicts against them. The whole remedial purpose of the F. E. L. A. is thus subverted. This is precisely what occurred in the case at bar.

The trial court in this case charged the jury as follows at Page 329(a):

> ". . . If, after considering all the evidence, the question of whether or not the defendant or its employees, other than the plaintiff, of course, were negligent in failing to use reasonable care to provide plaintiff with a safe place to work is so evenly balanced in your mind *that you have no conviction,* then you must find for the defendant. It is her burden to *convince* you that there was this negligence. . . ." (Emphasis supplied.)

Further at Page 333(a) the Court went on to say in emphatic reiteration of this manifestly erroneous statement of law as to burden of proof:

> "*Now, this is one of the big points for you,* this question of whether the plaintiff has proved to you by a preponderance of the evidence that there was a failure to use reasonable care under all these circumstances. There she was with her galoshes, her overalls, her work jacket. The evidence must do more than raise a doubt in your mind on these points, if plaintiff is to sustain the burden. *If there is just a doubt in your mind, you must bring in a verdict for the defendant, and that ends your consideration of the case. You don't need to go any further. . . .*" (Emphasis supplied.)

The net effect of these instructions was to impose upon plaintiff the burden of 'convincing" the jury which Webster's New Collegiate Dictionary defines to mean "to bring by argument to belief beyond doubt." Such has never been the burden of proof in a civil jury case, least of all in F. E. L. A. cases. The majority of the Court of Appeals, straining to avoid the sheer error of the charge, affirmed the trial court's language, saying at page 8a:

> "In any event there must surely be a *conviction* in the minds of the jurors before they may bring in a verdict for the plaintiff. They must be *convinced* or satisfied [footnote] in their minds that the plaintiff is entitled to their verdict." (Emphasis supplied.)

As Judge Kalodner so capably demonstrates in his dissent, certainly this is not the law. It is indeed noteworthy that the majority below made no effort to deal with the cases cited and discussed by Judge Kalodner. This refusal is the source of the error and conflict now existing as between the Third Circuit on the one hand and all state courts of last resort and Courts of Appeals which have ruled on the problem.

In *Larson v. Jo Ann Cab Corp.*, 209 F. 2d 929 (C. A. 2, 1954), Judge Frank acknowledged the state of authorities at Page 930:

"Courts and commentators have said that, in the ordinary civil suit, usually a judge commits reversible error if he instructs the jury that the plaintiff cannot recover unless 'he convinces' them (or the like). [Footnote to authorities] Such a charge, it is maintained indicates something midway between a 'preponderance' and 'beyond a reasonable doubt,' and should therefore be reserved for certain exceptional sorts of civil cases where more than a 'preponderance' is required. . . ."

He recognized the objections to the court's failure to abide by the rule applicable when he stated at Page 935:

"Nevertheless, at least until such time as we have satisfactory returns from checks of popular reactions to the traditional formulas, we think we should adhere to the ruling that, in an ordinary civil suit, such as the instant case, words like 'convince' and 'conviction' should be shunned in a jury charge. . . ."

Any attempt to distinguish *Larson* on grounds that the above quoted language was dicta must fail in the light of *Johnson v. Erie Railroad Co.*, 236 F. 2d 352 (C. A. 2, 1956) where the law in the Second Circuit is laid down very clearly and in the same tenor as *Larson*. *Johnson* should have been dispositive here. There the trial court had charged that it was up to the plaintiff to prove the medical side of his F. E. L. A. case with "reasonable certainty." The unanimous Court found that this instruction was erroneous in holding at Page 354:

". . . At least as to injuries actually suffered prior to the trial, it was incumbent on the plaintiff to prove a causal connection with the defendant's negligence only by a fair preponderance of the evidence: to require proof to a 'reasonable certainty' imposed an excessive burden."

In the case at bar the trial judge not only required proof at the level of "a reasonable certainty" by using the

language as to "just a doubt in your mind," but went even further when he spoke in terms of "conviction." This did nothing less than lay upon plaintiff the burden of the prosecution in a criminal action.

The language in the case at bar as to "doubt" is strikingly similar to language charged in the *Johnson* case, *supra* and quoted at Page 355:

> ". . . *if you have any doubt about it then* he [the plaintiff] has not sustained the burden of proof which the law imposes upon him."

Of that instruction Judge Hincks said at Page 355:

> "That statement was erroneous. Notwithstanding a doubt thus engendered a jury might yet properly find that the plaintiff had sustained the burden under which he labored."

State courts as well as Federal Courts recognize the error of the language used in the case at bar. See *Nelson v. Lee*, 32 So. 2d 22 (Ala., 1947); *Hill Grocery Co. v. Wilson*, 89 So. 2d 687 (1956); *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 73 A. 2d 387 (1950); *Botta v. Brunner*, 42 N. J. Super. 95 (1956).

Point V.

A Jury Charge in an F. E. L. A. Case Which Instructs That ". . . [the Jury] Should No More Be Swayed by Sympathy for the Plaintiff Than for the Widows and Orphans Who May Be Receiving Dividends or Interest From [Defendant Railroad] and Who May Need That Income for Themselves and for Their Families"[3] Is Highly Prejudicial and in and of Itself Commands the Grant of a New Trial if a Verdict for Defendant Is Returned.

As we have shown, *supra*, this charge was an extraordinary concentration of error. Perhaps the single most

3. 325(a).

shocking and prejudicial aspect of it was the instruction quoted in the heading of this Point, *supra*.

At the very outset of the charge the trial judge erroneously struck out one whole theory of liability.[4] Having thus improperly sapped petitioner's cause of action of much of its strength, he immediately thereafter fatally infected what little was left of her case with the above-quoted instruction.

In attempting to justify the instruction, the majority below stated at page 3a:

> ". . . [the trial judge] was not, as the plaintiff argues, bringing into the case for the jury's consideration additional parties who had no place there, as was done in the cases which the plaintiff cites. On the contrary he was obviously seeking to eliminate all such extraneous parties on both sides from the jury's consideration and in this graphic way to make it clear to them that no sympathy of any sort for either side should play any part in their decision."

Fairly paraphrased, this statement suggests that the way a trial judge should teach objectivity is to bring extraneous material into a case and then tell the jury to disregard it. It is a curious epistemology which expects a jury to learn objectivity by being asked to ignore the emotionally charged contrast of needy widows and orphans—untold numbers of them—pitted against one litigating claimant.

These were widows and orphans of whose existence, we hasten to add, there was not a shred of proof in the entire record of the case, and of whose dependency on the dividends and interest from respondent there was an equally total failure of proof.

In the terms of the trial judge and the majority below, this is "neutraliz[ing]"—a concept on these facts approximately as valid as unscrambling an egg.

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4. See "Point I", *supra*.

Even assuming, *pro arguendo*, that the comments of petitioner's counsel were not proper, this utterance by the trial judge can no more be justified in law than in instructional psychology. If the trial judge thought it was incorrect, he should have charged the jury to ignore that reference and thus take it from their consideration, a recognized procedure he had no hesitation in using when he charged *competent evidence* out of the case.[5] So too he could have ordered a mistrial or set aside a verdict for petitioner.

The majority below, so quick to invoke the trial judge's right of "neutralizing" alleged prejudice with rampant prejudice, has failed to heed the obligations of the rule laid down within the recent past by its very own court: that counsel may not reply in kind to improper remarks made by opposing counsel. *Robinson v. Pennsylvania R. Co.*, 214 F. 2d 798 (C. A. 3, 1954).

If recrimination by counsel be barred, how much more unseemly is it that the court indulge the equivalent of recrimination and then euphemize it as "neutralizing." We protest not the motive but the effect of such behavior, and that effect is more prejudicially telling when accomplished by a court than it would be if attempted by zealous counsel in the heat of trial because it is invested with the dignity and authority of the court.

The instruction complained of was prejudicially argumentative and erroneous, inexcusable on the theory sought to justify it below, and a radical departure from traditional concepts of fair trial. *Quercia v. U. S.*, 289 U. S. 466, 53 S. Ct. 698 (1933); *Sperber v. Connecticut Mut. Life Ins. Co.*, 140 F. 2d 2 (C. A. 8, 1944), cert. denied 321 U. S. 798, 64 S. Ct. 939 (1944); *Knapp v. Kinsey*, 232 F. 2d 458 (C. A. 6, 1956), cert. denied 352 U. S. 892, 77 S. Ct. 131 (1956); *Cook v. U. S.*, 18 F. 2d 50 (C. A. 8, 1927); *Boatright v. U. S.*, 105 F. 2d 737 (C. A. 8, 1939); *Stoneking v. U. S.*, 232 F. 2d 385 (C. A. 8, 1956), cert. denied 352 U. S. 835, 77 S. Ct. 54

5. See "Point I", *supra*.

(1956); *Virginian Railway Co. v. Armentrout*, 166 F. 2d 400 (C. A. 4, 1948). Identical conduct has been declared prejudicial reversible error in Pennsylvania, where this trial court sat. *Narcisco v. Mauch Chunk Twp.*, 369 Pa. 549, 87 A. 2d 233 (1952); *Knight v. Allegheny County*, 377 Pa. 502, 105 A. 2d 141 (1954).

If this error is countenanced, and not corrected by grant of certiorari and reversal of the judgment below, the mischief to which it will lead will be immediate. It is a bold invitation to every corporate defendant in personal injury actions—F. E. L. A., Jones Act, common-law negligence—to invoke the pitiful, irrelevant (and unproven) image of needy widows and orphans dependent upon defendants for dividends and interest whenever sympathy—real or otherwise—comes into a plaintiff's case. The argument such defendants will urge is as foreseeable as the mischief: "If courts can 'neutralize' this way, surely we can too."

CONCLUSION.

The judgment in the case at bar was the result of serious and prejudicially erroneous errors of law justification for which was attempted in the decisions supporting the judgment below. Those decisions are in direct conflict with a mass of consistent, authoritative law in this court, federal Courts of Appeal and state courts of last resort on a number of vital aspects of the Federal Employers Liability Act and civil trial by jury generally.

Unless corrected here by a grant of certiorari, reversal and new trial, the errors below will deprive petitioner of rights granted her by solemn Act of Congress, ramify into emasculating administration of the F. E. L. A. in courts throughout the entire nation and thus deprive countless other employees of interstate carriers by rail of the benefits of this remedial legislation. The errors below also pose

the immediate threat of serious disruption of long standing fundamental rules governing civil trial by jury generally.

This petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

B. Nathaniel Richter,
Seymour I. Toll,
Barbara Ann Duffy,
Richter, Lord and Levy,
Counsel for Petitioner.

APPENDIX.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11,908

LUCILLE H. BURCH,
Appellant

v.

READING COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued November 5, 1956

Before MARIS and KALODNER, *Circuit Judges*, and WORTENDYKE, *District Judge*.

Opinion of the Court.

(Filed January 8, 1957)

By MARIS, *Circuit Judge*.

This is an appeal by the plaintiff from a judgment entered on a verdict in favor of the defendant in an action brought under the Federal Employers' Liability Act to recover for injuries suffered by the plaintiff while working as a track laborer for the defendant railroad. The plaintiff asserts that the trial judge erred in certain trial rulings and instructions to the jury. All the matters complained of were fully considered by the district court in an elaborate opinion by Judge Van Dusen denying the plaintiff's motion

for a new trial. 140 F. Supp. 136. Finding ourselves in full accord with what is there said we conclude that the judgment should be affirmed. To what Judge Van Dusen has said we need add merely a few comments with respect to three of the objections raised to the trial judge's charge.

The plaintiff was injured on November 27, 1950 while working as a member of a railroad section gang at Scott's Lane crossing in the East Falls section of Philadelphia. That morning her task was to carry dirt in a shovel from a pile by the side of Scott's Lane below the crossing to fill in holes under the rails of the tracks in the crossing. She had been engaged in this work for about an hour when on crossing Scott's Lane with an empty shovel returning from the tracks toward the pile of dirt she fell and broke her ankle. It was for this injury that she sought to recover damages in the suit before us.

At the time of the trial the plaintiff was a widow 55 years of age. She testified that she had raised two children, not her own, both of whom were then grown and no longer living with her. In his closing argument to the jury, counsel for the plaintiff laid much stress on this fact, appealing for a verdict which would enable her to be "a mother to little children that needed it" and to make it possible for her to leave something "to those who are near and dear to her".[1] To neutralize any possible prejudice resulting from this appeal on behalf of nonexistent "little children" the trial judge felt it was his duty, as he states in his opinion,[2] to charge the jury as follows:

> "If you are sympathetic or prejudiced in favor of or against either the plaintiff or the defendant, you should not allow such sympathy or prejudice to influence you at all in your verdict. You should no more be swayed by sympathy for the plaintiff than for the widows and orphans who may be receiving dividends

1. The exact language used by counsel is quoted in the opinion of the district court, 140 F. Supp. 136, 150-151.
2. 140 F. Supp. 136, 151.

or interest from the defendant company and who may need that income for themselves and for their families. No sympathy of any sort for either side should play any part in your decision."

While this language is perhaps not what this court would have chosen we cannot hold that it was error for the trial judge so to charge under the circumstances. He was not, as the plaintiff argues, bringing into the case for the jury's consideration additional parties who had no place there, as was done in the cases which the plaintiff cites. On the contrary he was obviously seeking to eliminate all such extraneous parties on both sides from the jury's consideration and in this graphic way to make it clear to them that no sympathy of any sort for either side should play any part in their decision. A federal trial judge has the right, indeed the duty, to do this.[3] And he has a wide discretion as to the manner of doing it.

We must assume that jurors are intelligent and conscientious individuals, each with a background of knowledge and experience. They are not robots who come to the courthouse with minds tabula rasa and who respond mechanically to every impression they receive in the court room. On the contrary they are expected, as by explicit direction of the trial judge this jury were, to use their common sense and their experience in the affairs of life in evaluating the testimony and reaching a verdict. It would be naive to assume that a group of intelligent jurors did not know, what is common knowledge, that a large railroad corporation such as the defendant here is very likely to have among its stockholders widows and orphans who receive income from its dividends. To thus point out that sympathy might enter into the picture on the defendant's side as well as the sympathy for which the plaintiff's counsel had appealed, and to direct that all considerations of sympathy on either side be left wholly out of their delibera-

3. See N. Y. Central R. R. Co. v. Johnson, 1929, 279 U. S. 310, 318.

tions was in our view within the discretionary power of the trial judge in this case.

Another matter calling for additional comment relates to the charge of the trial judge with respect to the plaintiff's burden of proof. In this connection the trial judge said to the jury:

> "The plaintiff has the burden of proving to you by the weight or the fair preponderance of the evidence that the defendant or its employees, other than the plaintiff, did not provide her with a reasonably safe place to work and that this negligence caused, in whole or in part, this injury to plaintiff. If, after considering all the evidence, the question of whether or not the defendant or its employees, other than the plaintiff, of course, were negligent in failing to use reasonable care to provide plaintiff with a safe place to work is so evenly balanced in your mind that you have no conviction, then you must find for the defendant. It is her burden to convince you that there was this negligence. Also, if the question of whether or not such negligence was a factor in causing the injury is so evenly balanced in your mind that you have no conviction, then you must find for the defendant.
>
> . . .
>
> "Now, this is one of the big points for you, this question of whether the plaintiff has proved to you by a preponderance of the evidence that there was a failure to use reasonable care under all these circumstances. There she was with her galoshes, her overalls, her work jacket. The evidence must do more than raise a doubt in your mind on these points, if plaintiff is to sustain the burden. If there is just a doubt in your mind, you must bring in a verdict for the defendant, and that ends your consideration of the case. You don't need to go any further. On the other hand, if you are convinced by the preponderance of the evi-

dence that the defendant or its employees, other than the plaintiff, were negligent, and that this negligence was a factor in causing the injury, then you must find for the plaintiff.

. . .

"If you find for the plaintiff for the reasons stated above, then you must consider the damages. The mere fact that I instruct you on the subject of damages must not be considered as an indication of my views on whether or not the plaintiff has sustained her burden of proving that the defendant or its employees were negligent in failing to provide her with a safe place to work. If you find that the plaintiff sustained the burden of proving the defendant negligent, through its failure to use reasonable care in providing a safe place to work, then you must carefully consider all the following elements of damage: First, loss of past earnings; second, loss of future earnings; third, pain, suffering, injuries, mental and physical; fourth, medical expenses, past and future.

. . .

". . . I must point out to you the various possibilities in accordance with the contentions of counsel, and it is for you to find the facts, and nothing I said should be allowed to make you feel that the plaintiff had not sustained her burden of proving this case or that she had. That is for you to decide. That is your problem. All I can tell you is the law, which is that the defendant has the duty to use reasonable care and to provide this plaintiff with a reasonably safe place to work under all the circumstances."

The plaintiff objects to these instructions upon three grounds. One is that it was error, as she argues, for the trial judge to use the words "conviction" and "convince" in explaining to the jury the nature of their fact finding

duty in this civil case. Another is that it was equally erroneous to use the word "doubt" for that purpose. The third is that it was error in the two portions of the charge last quoted not to add to each reference to the plaintiff's burden of proof the statement that the proof need only be made by a preponderance of the evidence. We are satisfied that there is no merit in the plaintiff's contentions in this regard and that the portions of the charge which we have quoted, considered as a whole, adequately informed the jury as to their legal duty in the case. The problem involved in the first two contentions, however, calls for a little more searching analysis than is customarily given to it. For we are here dealing with ancient legal phrases, cliches which may have precise meaning for judges and lawyers but which must be far less than clear to lay jurors.[4] It is, however, with the success of these statements in illuminating the minds of jurors as to their fact finding duty that we must be concerned.

The classical statement of the burden of proof in an ordinary civil case such as this is that the facts must be proved by a "preponderance of the evidence". But there are obvious difficulties with this metaphorical description of the plaintiff's burden of persuasion. It does not refer directly to the fact finding process itself but merely to the character of the evidence required and even there is less than clear since it refers only to the "weight" of the evidence. The latter ambiguity is perhaps cleared up by the usual statement to the effect that "preponderance" is not dependent upon the number of witnesses testifying on either side but rather upon the credibility which, in the

4. This is graphically indicated by the results of a questionnaire sent to former jurors by Judge Walter B. Wanamaker of Akron, Ohio. In answer to the question, "What propositions of law were most difficult to understand?" the answers were:

"a. Preponderance of the evidence	232
b. Reasonable doubt	136
c. Negligence	110
d. Proximate cause	203."

Trial by Jury, 1937, 11 U. of Cin. L. Rev. 119, 192.

light of all the evidence in the case, the jury attributes to their testimony and the effect of that testimony in inducing belief in its truth. But even so, it has been suggested with much force that the use of this ancient metaphor referring, as it does, to the "greater weight" of evidence is intrinsically of very limited usefulness in giving to a juror real guidance as to his duty.[5] One cannot weigh evidence as on a scale. Certainly no mechanical device is available to jurors to measure the truthfulness of a witness or the accuracy of his memory.

Moreover, as we have suggested, the "preponderance of the evidence" formulation is not directed to the basic procedural problem confronting the jury, that is, the degree of accuracy in finding the facts which they are being asked to employ in reaching their verdict in a civil case. Certainly they are not required to find the facts to an absolute certainty or even beyond a reasonable doubt, as in a criminal case. But we do not think it is wrong to say, as the trial judge in this case did, that the jury must be *convinced* by the fair preponderance of the evidence that the facts were as the plaintiff asserted them to be.

It would doubtless be much more comprehensible to a jury if they were told, as Professor McBaine has suggested in his thoughtful essay on the subject,[6] that the plaintiff's burden is to convince them upon all the evidence before them that the facts asserted by the plaintiff are more probably true than false.[7] This, we think, is the intended effect of

5. See Judge Frank's discussion of the subject in Larson v. Jo Ann Cab Corp., 2 Cir. 1954, 209 F. 2d 929. See also McBaine, Burden of Proof: Degrees of Belief, 1944, 32 Cal. L. Rev. 242, 247; McCormick on Evidence, 1954, p. 676.

6. McBaine, Burden of Proof: Degrees of Belief, 1944, 32 Cal. L. Rev. 242, 262. And see Morgan, The Law of Evidence, 1941-1945, 59 Harv. L. Rev. 481, 492-493, and McCormick on Evidence, 1954, p. 677.

7. In Beckwith v. Town of Stratford, 1942, 129 Conn. 506, 29 A. 2d 775, Chief Justice Maltbie described the standard of proof in a civil case as "proof which produces 'a reasonable belief of the probability of the existence of the material facts' ". Likewise in Moffie v. Slawsby, 1915, 77 N. H. 555, 94 A. 193, Chief Justice Parsons said:

the "preponderance of the evidence" rule and it would place the emphasis upon the nature of the function which the jurors are being asked to perform and the degree of belief which must be produced in their minds before the plaintiff is entitled to a favorable finding from them.

In any event there must surely be a conviction in the minds of the jurors before they may bring in a verdict for the plaintiff. They must be convinced or satisfied [8] in their minds that the plaintiff is entitled to their verdict. This, of course, need not be a conviction of the certainty of the facts they find,[9] but they must at least be convinced that the evidence considered as a whole, its "preponderance" to use the traditional term, indicates that the facts asserted by the plaintiff are probably true. The contrast here is between two different states of mind, a state of belief and a state of doubt or uncertainty. If, as the trial judge suggested in his charge in this case, the eivdence merely raises a doubt in the jurors' minds as to whether or not the facts asserted by the plaintiff are true or if in their minds the probabilities of those facts being true or false appear equal the plaintiff has not met his burden of proof and a finding for the plaintiff would be inconsistent with the jurors' duty to render a true verdict.

We are satisfied that in the portions of the charge to which the plaintiff objects and which we have quoted above the trial judge adequately explained to the jury their duty in this regard. We are not impressed with the plaintiff's contention that the trial judge should have included a specific reference to the preponderance rule or its equiva-

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"In the ordinary civil case, the issues are decided by a balance of probabilities. . . . When the party having the affirmative of the issue has established the probable truth of his contentions, he has met the burden resting upon him." And see Northwest States Utilities Co. v. Ashton, 1937, 51 Wyo. 168, 65 P. 2d 235; Mutual Life Ins. Co. of New York v. Springer, 1937, 193 Ark. 990, 104 S. W. 2d 195; 20 Am. Jur., Evidence, §§ 1249, 1250.

8. In this setting the two verbs appear to be synonyms.

9. Murphy v. Waterhouse, 1896, 113 Cal. 467, 45 P. 866; 20 Am. Jur., Evidence, §§ 1249, 1250.

lent in connection with each of the references which he made later in his charge to the plaintiff's burden of proof. He had already adequately, as we have pointed out, instructed the jury as to their duty to follow the preponderance rule and we certainly cannot say that it was error not thus to reiterate summary references to that rule.

The other matter upon which we shall comment briefly relates to the instructions given by the trial judge with respect to the defendant's duty to provide the plaintiff with a safe place to work. The following portion of the charge is objected to:

> "Reasonableness varies with the place and the danger of the work, Less diligence is required to constitute reasonable care where the danger is slight than would be required where the danger is great. If you find that the injury resulted from an accidental slip on one of a few pebbles, neither the defendant nor the plaintiff could be said to be negligent, and you must find a verdict for the defendant, of course. The railroad isn't responsible for accidents. They might happen anywhere."

In considering the object raised to this language it must be borne in mind that the trial judge affirmed and read to the jury 8 of the plaintiff' points for charge which related to the applicable principles of law with respect to the defendant's duty to provide the plaintiff with a safe place to work. Among these were the plaintiff's 7th point, as follows:

> "7. If you find that the plaintiff slipped, tripped or fell because of the presence of loose stones or pebbles which were present in the highway where she was obliged to work or where the defendant knew or should have known she would be working and that such condition was one which the railroad company knew or should have known was one which might cause her to fall and suffer injury, then you may find that the failure

of the railroad company to make the place reasonably safe or to provide a reasonably safer way for the plaintiff to perform her duties was negligence. If you find that the plaintiff sustained her injuries in whole or in part by reason of such negligence on the part of the defendant railroad company then your verdict must be for the plaintiff."

It must also be remembered that the plaintiff's place of work at the time of her injury was on a public street upon which she slipped and fell. The evidence was sharply conflicting as to whether the street was in a dangerous condition, being covered with loose pebbles, or whether it provided a safe surface for walking with only a few pebbles scattered here and there. In the light of the charge as a whole and the affirmance of the plaintiff's points the instruction complained of permitted the jury to find that the street upon which the plaintiff was walking was a reasonably safe place to work and that her injuries were the result of a purely accidental slip by her on one of a few pebbles. This was not error. For contrary to the rule under workmen's compensation acts the Federal Employers' Liability Act does not impose liability without fault and there is, therefore, no liability on the part of an employer under that Act for injuries suffered by an employee as a result of a pure accident occurring while working in a reasonably safe place.

The judgment of the district court will be affirmed.

KALODNER, *Circuit Judge*, dissenting

I disagree with the majority's view that the trial judge was acting within his discretionary power when he made reference in his charge to ". . . widows and orphans who may be receiving dividends or interest from the defendant company and who may need that income for themselves and their families. . . ."

In my opinion the injection into the case of the pecuniary interest of widows and orphans dependent upon income

from their investment in the defendant railroad company's securities constituted prejudicial error requiring reversal.

Two wrongs don't make a right.

Plaintiff's counsel was clearly out of bounds when he injected into the case the fact that the plaintiff had raised two foundlings (long since grown up) as her own and at least inferentially appealed for a verdict which would permit further such philanthropy on her part. His conduct warranted withdrawal of a juror or at the very least a vigorous caution to the jury to disregard this unjustifiable attempt to invoke its sympathy. The trial judge chose to take neither one of these available steps but on the other hand, no doubt unwittingly, chose, as the majority put it, "to neutralize any possible prejudice resulting from this appeal on behalf of non-existent 'little children.' "[1]

I fully subscribe to the majority's view as to the trial judge's motive but we cannot give judicial sanction to fighting fire with fire. Here the trial judge sought to extinguish the flame of sympathy for foundlings ignited by plaintiff's counsel with a countering flame of sympathy for widows and orphans. Neither the foundlings nor the widows and orphans were parties to this litigation and their injection into the case was violative of the rights of the respective parties and constituted reversible prejudicial error. Cf. Knight v. Allegheny County, 377 Pa. 502 (1954) and Narcisco v. Mauch Chunk Township, 369 Pa. 549 (1952).

As to the trial judge's instructions with respect to the plaintiff's burden of proof.

In the first two portions of the trial judge's charge which the majority quotes he twice instructed the jury that

1. The trial judge put it this way in his opinion reported at 140 F. Supp. 136 (E. D. Pa. 1956), at page 151:

"In view of this emphasis on these 'little children' and the plaintiff having something to leave to those 'who are near and dear to her,' the trial judge felt it was his duty to neutralize any possible prejudice by including in his charge a sentence indicating that there might be those interested in the defendant who were also in need and included the following paragraph in his charge:"

it must find for the defendant if it had "no conviction" and also twice instructed it that it must be "convinced" of the defendant railroad's negligence supplementing those instructions with the admonition that "If there is just a doubt in your mind, you must bring in a verdict for the defendant . . . ."

I disagree with the majority's view that the instructions stated did not constitute prejudicial error.

As was stated by Judge Frank in Larson v. Jo Ann Cab Corp., 209 F.2d 929, 930, 935 (2d Cir. 1954):

> "Courts and commentators have said that, in the ordinary civil suit, usually a judge commits reversible error if he instructs the jury that the plaintiff cannot recover unless he 'convinces' them (or the like). Such a charge, it is maintained indicates something midway between a 'preponderance' and 'beyond a reasonable doubt,' and should therefore be reserved for certain exceptional sorts of civil cases where more than a 'preponderance' is required . . . Nevertheless . . . we think we should adhere to the ruling that, in the ordinary civil suits . . . words like 'convince' and 'conviction' should be shunned in a jury charge."[2]

In common parlance "conviction" is synonymous with "certainty" and "convince" is "to cause to feel certain."[3]

In instructing the jury that it must find for the defendant if it had "no conviction" and that plaintiff had the burden "to convince" it that defendant was negligent, the trial judge imposed a burden of proof on plaintiff far in excess of that imposed by the "preponderance of the evidence" rule.

In Nelson v. Lee, 32 S.2d 22, 24 (1947) the Supreme Court of Alabama held that reversible error was committed by the trial judge in giving the following instruction:

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2. In that case no exception was taken to the charge as made and the Court held it was not adequately reserved for review.

3. Webster's New World Dictionary of the American Language, College Ed. 1956.

> "I charge you, gentlemen of the jury, that if after a consideration of all the evidence in this case your minds are left in a state of doubt and uncertainty so that you are not reasonably satisfied from the evidence that on the occasion complained of the defendant was guilty of negligence in and about the transportation, handling or removal of the rifle in question you cannot return a verdict in favor of the plaintiff and against the defendant."

In doing so it stated that ". . . this charge placed too high a degree of proof upon the plaintiff."

The same court in the recent case of Hill Grocery Co. v. Wilson, decided September 13, 1956, 89 S.2d 687, ruled that the trial judge had correctly, on a motion for a new trial held that he had committed prejudicial error when he had given the following instructions to the jury:

> ". . . Where the evidence leaves it uncertain as to whether the cause of the injury was something for which the defendant was responsible, or something for which the defendant was not responsible, there is a failure of proof, and unless you are reasonably satisfied from the evidence in this case that the negligence of the defendant, if any, was the proximate cause of the injuries sustained by Mrs. Wilson, you cannot return a verdict in favor of the plaintiff and against the defendant."

In ruling that the trial judge had acted correctly in granting a new trial the Supreme Court of Alabama said of the instructions which had been held to be prejudicial error:

> ". . . if the jury had the slightest uncertainty as to whether the defendant was responsible for the injury, they were required to find that there was failure of proof as to such fact. The effect of the charge is to place the burden upon the plaintiff to show beyond all uncertainty that the defendant was responsible for the

injury sustained by the plaintiff. As pointed out in the foregoing authorities, the charge places too high a degree of proof upon the plaintiff."

In Botta v. Brunner, 42 N.J. Super 95 (1956), the Appellate Division of the Superior Court of New Jersey held that the trial judge had committed prejudicial error when he charged the jury that it was incumbent upon the plaintiff ". . . to prove by *clear convincing evidence* that her injuries were the result of the accident," and that "The evidence must, therefore, establish *with reasonable certainty* that the injuries and losses for which you award any damages are properly attributable to the accident." With respect to these instructions the Court stated:

> "There can be no doubt that the court's imposition upon plaintiff of the burden of producing 'clear, convincing' evidence that her claimed 'injuries' easily to be understood by the jury in the added sense of disabilities, were the result of the accident, assessed her with a probative burden exceeding what the law calls for in an ordinary civil action."

In Johnson v. Erie Railroad Company, 236 F.2d 352, 354, 355 (2d Cir. 1956), after correctly charging the jury with respect to the burden of proof the trial judge went on to say:

> "It is up to you ladies and gentlemen to determine whether the evidence adduced before you shows with *reasonable certainty* that the plaintiff's alleged injury or future disability, if you find he has any, resulted from the aggravation of the previous condition, or, rather from the previous condition itself, in order to warrant a recovery of damages in this case."

The Appellate Court held that the instruction given was erroneous, stating:

> ". . . At least as to injuries actually suffered prior to the trial, it was incumbent on the plaintiff to prove a

causal connection with the defendant's negligence only by a fair preponderance of the evidence; *to require proof to 'a reasonable certainty' imposed an excessive burden.*" (Emphasis supplied)

The Court also held erroneous the following instruction:

". . . I don't want to review that evidence, but it is up to you to decide whether you want to believe one or the other, because *if you have any doubt about it* then he (the plaintiff) has not sustained the burden of proof which the law imposes upon him."

Said the Court of that instruction:

"That instruction was erroneous. Notwithstanding a doubt thus engendered a jury might yet properly find that the plaintiff has sustained the burden under which he labored."

In the third and fourth portions of the trial judge's instruction relating to plaintiff's burden of proof, quoted by the majority the jury was thrice told that plaintiff must sustain "the burden of proving" the defendant's negligence. That of course was reversible error since the instructions omitted any reference to a "fair preponderance of the evidence."

In Se-Ling Hosiery, Inc. v. Margulies, 364 Pa. 45 (1950), the trial judge instructed the jury in a civil action that the plaintiff "had the burden of proof" and did not add the phrase "by the fair preponderance of the evidence." Said the Court at page 50:

". . . If a trial judge in a civil case instructs the jury that plaintiff 'has the burden of proof' the defendant has no cause for complaint, because of what is implicit in that phrase when it stands alone. *However, a plaintiff would have grounds for complaint if the jury was not instructed that 'burden of proof' in a civil case meant only 'by the fair preponderance of the evidence'*

the members of the jury might have the idea that the phrase 'burden of proof' meant some higher degree of proof than mere preponderating evidence. Therefore, the omission of the phrase 'by the fair preponderance of the evidence' in the judge's charge in the instant case was something of which the plaintiff could have justly complained . . ." (Emphasis supplied)

With respect to the sum total of the instructions as to burden of proof, above discussed, the following statement made in Johnson v. Erie Railroad Company, supra, at page 156 is particularly appropriate:

"We need not consider how far separately each of the statements referred to would require reversal, since the cumulative effect of the several references is such as to make the possibility of confusion too great to disregard. We think the plaintiff entitled to a new trial."

Because of the view expressed that a new trial should be granted because of the trial judge's erroneous and confusing instructions relating to the plaintiff's burden of proof, it is unnecessary to dwell at length on her contention respecting the trial judge's instruction that

". . . If you find that the injury resulted from an accidental slip on one of a few pebbles, neither the defendant nor the plaintiff could be said to be negligent, and you must find a verdict for the defendant."

I subscribe to the plaintiff's contention that this instruction was erroneous because it inferentially ruled that there was no absolute duty on the part of the defendant to provide plaintiff a reasonably safe place to work and operated in effect to remove from the jury's consideration the "safe place to work" issue.

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:

IDA O. CRESKOFF,
Clerk.

January 8, 1957.